In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 673

CALIFORNIA SHIPBUILDING CORPORATION (a corporation),
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and BELLE REBECCA GADDIS,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

FOREWORD.

With the growth in the activities of administrative boards, it is more important than ever that this Honorable Supreme Court of the United States declare that which constitutes due process in their procedure. Delegation of functions and a shifting of responsi-

bility are now arising in these tribunals to such extent that in but few instances is a decision gained from those whose duty it is to render the decision. Supernumeraries and monitors are permitted actually to decide by making oral and written reports in such vague manner that the members of the Commission itself cannot reach any real decision and the latter could well employ the proverbial rubber stamp in affixing signatures.

This method of functioning does not pertain exclusively to the Industrial Accident Commission of the State of California; we venture to say it is common to a vast majority of boards, commissions, departments and officials throughout the land, both State and Federal.

This case can well be a landmark in the field of administrative law. Not often has a litigant the good fortune to ascertain the hidden routine by which a matter is disposed of in an administrative or quasi-judicial tribunal. Grudgingly surrendered to the Court, as the petition here discloses, were the files—styled by the respondent Commission, as "confidential and secret"—by which the process of adjudication was delegated and surrendered. The members of the Commission, in whom the duty of deciding was imposed, had nothing before them by which to make a real decision—they had neither the record nor any intelligent summary of the record on the vital issue in the proceeding.

We, of course, do not contend that the members of the Commission must personally preside over every

hearing. What we maintain is that when deciding a case—and the law fixed upon them the duty to decide—they must have some basis upon which to decide, other than a mere recommendation upon the part of a subordinate, which they can blindly either adopt or reject. In the language of

> *Morgan v. United States* (1936), 298 U.S. 478, 481, 80 L. Ed. 1288, 1295,

a case presented hereinafter,

> "The one who decides must hear."

Anything less than this cannot be due process of law.

It has been appropriately said that the Industrial Accident Commission, in ruling upon a controversy arising under the Workmen's Compensation Act, performs a judicial function and in legal effect sits as a Court.

> *Pacific Coast Casualty Co. v. Pillsbury,* 171 Cal. 319, 322, 153 Pac. 24, 26;
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> *Western Metal Supply Co. v. Pillsbury,* 172 Cal. 407, 411, 156 Pac. 491, 493, Ann. Cas. 1917E 390, 394.

The inquiry as to whether procedural due process of law has here occurred is to be approached with that true conception of the Commission's functions.

I.

THE HOLDING OF THE DISTRICT COURT OF APPEAL THAT DUE PROCESS OF LAW WAS AFFORDED TO YOUR PETITIONER IS CONTRARY TO THE DECISIONS OF THE UNITED STATES SUPREME COURT IN THE TWO APPEALS IN THE MORGAN CASE.

When it became apparent that the Industrial Accident Commission had assumed to decide this case in the manner set forth in the petition for this writ, the two decisions,

> *Morgan v. United States* (1936), 298 U.S. 468, 80 L. Ed. 1288,

and

> *Morgan v. United States* (1938), 304 U.S. 1, 82 L. Ed. 1129,

were cited to the Supreme Court of California and two of the seven justices were sufficiently impressed that they voted in favor of granting the petition for hearing solely upon the ground of the absence of due process of law.

We deem the *Morgan* cases so closely in point that a thorough analysis of them, with comparison to this proceeding, is (we trust) justified.

The bills of complaint in the *Morgan* case sought to restrain the enforcement of a rate order issued by the Secretary of Agriculture. That official, under the Packers and Stockyards Act, was empowered to fix reasonable rates, after a hearing, for the buying and selling of livestock.

The bills of complaint alleged that the Secretary of Agriculture had not heard or read the evidence and

that his only source of information was through private consultation with the employees of the Department of Agriculture. The record showed that the testimony had been taken before an Examiner.

On motion of the Government, these allegations were eliminated from the bills of complaint and injunctive relief was denied.

The Supreme Court of the United States ordered reversal. This Court held that the foregoing allegations were effective in showing an absence of due process of law.

This Court held in the first instance that the proceeding required the taking and weighing of evidence, determinations of fact based upon the consideration of evidence and the making of an order supported by findings as to the facts and that hence it was a proceeding of a "quasi-judicial character."

The Court then stated (298 U.S. 480, 80 L. Ed. 1295):

> "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. *If the one who determines the facts which underlie the order has not considered evidence or*

*argument, it is manifest that the hearing has not been given.''**

The Court stated further (298 U.S. 481, 80 L. Ed. 1295):

> "It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. **The one who decides must hear.**''

At the point following the language which has just preceded, the opinion concedes that evidence may be taken by an Examiner and may be sifted and analyzed by competent subordinates. The Court added (298 U.S. 481, 80 L. Ed. 1295):

> "But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred.''

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*Emphasis throughout is ours.

As the Court points out (298 U.S. 481, 80 L. Ed. 1295), to permit one official to examine the evidence, and another official to make the findings and order does not necessarily comprehend that the latter will adopt the recommendation of the former. What, in such instance, has become of any conception of a "hearing"? And if the latter official may overrule, without knowledge of the evidence, what sanctity is there in an adoption of the recommendation under the same circumstances?

After the reversal ordered by the first *Morgan* decision, the cause proceeded to trial. It is interesting to note that a showing was made at the trial of the process of decision by the Secretary of Agriculture quite similar to the showing of the routine of the Industrial Accident Commission in the matter at bar, although the proof made at the *Morgan* trial was probably further in the direction of due process than we have here.

This appears in the statement of facts in the second *Morgan* decision.

> *Morgan v. United States* (1938), 304 U.S. 1, 82 L. Ed. 1129.

The Secretary of Agriculture testified that the evidence had been taken before he took office—that he did not hear the oral argument—that the record was placed on his desk and "he dipped into it from time to time to get its drift"—he examined the briefs opposed to the Government—he conferred with the officials of the Department of Agriculture—he "con-

sidered the evidence before signing the order"—and he concluded with the statement that the substance of his action was his "independent conclusion" based on the findings of his subordinates and represented his "own independent reactions." (304 U.S. 17, 82 L. Ed. 1132).

The District Court held, upon the basis of this testimony, that the hearing was adequate and that the Secretary's order was lawful.

Judgment for the Government was again reversed by the Supreme Court of the United States in this, the second *Morgan* decision. This Court held that even in the presence of the testimony to which we have referred there had been no adequate hearing and due process of law had not been observed.

This Court ruled that it still remained that the Secretary was not sufficiently informed because the appellants had never been given the opportunity to meet the reports prepared by the subordinates or to argue upon them.

The Government argued upon the second *Morgan* appeal that the Court in its first decision had confirmed the practice of taking testimony before an Examiner. This Court ruled that its language in the prior opinion did not mean that the Secretary could remain uninformed as to the real contents of the record or that *ex parte* discussion was the substitute. (304 U.S. 21, 82 L. Ed. 1134).

We observe the closest analogy between the two *Morgan* decisions and the matter at bar. In fact, the

steps taken in the *Morgan* case more closely approached due process than in the matter at bar. As appears from the testimony of the Secretary of Agriculture, he had far more knowledge of the record than possessed of this record by any member of the Industrial Accident Commission.

II.

THE GROUND UPON WHICH THE DISTRICT COURT OF APPEAL HAS DECIDED THAT DUE PROCESS OF LAW WAS AFFORDED IS AN UNTENABLE ONE.

In ruling upon this Federal question, the District Court of Appeal rests upon the statement that "it would be impossible for the commissioners themselves to review the record or petitions for rehearing and the law does not impose that duty upon them". (Rec. bottom of p. 175).

We do not yield to this statement. Certainly, there is no showing that the Commissioners are unable to pass upon petitions for rehearing in what must be a small proportion of their proceedings—where a claim is made for the statutory penalty arising from alleged serious and wilful misconduct, and where such claim, if successful, will increase the normal award by one-half.

If the reasoning of the District Court of Appeal is to stand, it will mean this: the members of the Commission may refrain from familiarizing themselves with one hundred per cent of their cases. They may

say in each instance that it is impossible for them to devote attention to all of the applications for a rehearing; therefore, they will devote attention to none. Why not afford due process in a certain number of cases, which are the most serious ones, involving death awards and added penalties?

The plaint of the Commissioners—that the duties devolving upon them cannot be performed—seems more fancied than real. As we have seen, the requirement that "he who decides must hear", does not contemplate personal participation by any member of the Commission in the conduct of a session at which testimony is taken. "Hearing" is used in the *Morgan* cases as requiring, at least, through some intelligently prepared summary or report of the evidence, an opportunity by which a member of an administrative board may gain some personal knowledge of the nature and effect of the testimony and other evidence and then make his own independent decision based upon that knowledge.

There would appear to be no reason why the Industrial Accident Commission cannot adopt the practice here suggested.

This Court, in referring to the duty actually to decide, has stated at the conclusion of the last quotation we have made from the second *Morgan* decision (298 U.S. 481, 80 L. Ed. 1295):

> "That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

It has always been recognized that mere expediency is no ground for a departure from the requirements of procedural, due process of law.

As the report of the Attorney General's Committee on Administrative Procedure puts it, reviewed in the concurring opinion in

National Labor Relations Board v. Baldwin Locomotive Works (C.C.A. 3, 1942), 128 Fed. (2d) 39, 63,

if oppressed by too much detail, boards should arrange to divide labor, sit in divisions, or increase their membership. As further stated in that report, even a single department head, when undertaking to review a case, should assume responsibility.

Administrative officials should not be permitted to sit back, refrain from taking these measures and then blandly claim that the rendition of due process is not practical.

The citation by the District Court of Appeal of

Labor Code, Section 115,

providing for reference, is meaningless. The section itself provides for a final decision by the Commission. If construed otherwise, this section would itself deprive of due process in permitting decisions by irresponsible persons appointed at the whim of the Commission, when it is obvious, and has been so recognized in the very procedure here adopted by the Commission, that the real decision, both originally and in passing upon the petition for rehearing, should be by the members of the Commission.

Moreover, and in justice to the Legislature, it is to be noted that all petitions for rehearing are to be submitted to, and decided by, "the Commission."

Labor Code of California, Sections 5900-5910.

III.

FURTHER AUTHORITIES ARE IN ACCORD WITH THE DECISIONS OF THIS COURT IN THE MORGAN CASE.

In

State ex rel. Madison Airport Co. v. Wrabetz (Wis. 1939), 231 Wis. 147, 285 N.W. 584,

it was recognized that there is not due process of law where members of the Industrial Accident Commission assume to review an Examiner's findings without reading a transcript of the evidence, or without otherwise addressing themselves to the evidence. The Court there declined to issue a writ of mandate to correct the record—but did so merely upon the ground that the Commissioners could be made to testify, in the proceeding to review the award, as to what they did or did not do. The decision in the first *Morgan* case was quoted and followed.

In accord:

Kaegi v. Industrial Commission (Wis. 1939), 285 N.W. 845.

Similarly, in

Joyce v. Bruckman (N.Y. 1939), 15 N.Y. Sup. 679,

it was held that where only one member of the State Liquor Authority heard the evidence on the revoca-

tion of a license to sell liquor, and the other four members of the Board were ignorant of the record, the Board could not act with validity. This decision, likewise, was based upon the first *Morgan* decision.

National Labor Relations Board v. Cherry Cotton Mills (C.C.A. 5, 1938), 98 Fed. (2d) 444, 446, holds upon the authority of the *Morgan* cases, that where the National Labor Relations Board delegates authority to hirelings and adopts their suggested findings without inquiry or investigation, the order of the Board is invalid.

See also:

Donnelly Garment Co. v. National Labor Relations Board (C.C.A. 8, 1941), 123 Fed. (2d) 215, 220;

Crow v. Industrial Commission (Utah, 1943), 140 Pac. (2d) 321.

IV.

THE MANNER IN WHICH THIS CASE WAS DECIDED BY THE DISTRICT COURT OF APPEAL LIKEWISE DOES NOT AFFORD DUE PROCESS OF LAW.

As the petition discloses, counsel for your petitioner was denied the right to argue before the District Court of Appeal as to the entire inadequacy of these reports and memoranda when they were belatedly and grudgingly made available and this right was demanded as soon as the record disclosed the manner of so-called decision here adopted.

One of the most important elements in due process of law is in the right to representation by counsel.

Roberts v. Anderson (C.C.A. 10, 1933), 66 Fed. (2d) 874, 878;

16 *C.J.S.* (Constitutional Law) 1267, note 92.

As a consequence of this doctrine, due process is likewise denied where counsel is not given the opportunity to argue upon the merits of the cause. The fact that the case has been previously submitted is no answer, when, through the failure of the respondents to comply with the writ, the documents called for had not been furnished and when produced concurrently with counsel's request to argue concerning them.

As held in the second *Morgan* decision (*supra*) (304 U.S. 18, 82 L. Ed. 1132):

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. *The right to submit argument implies that opportunity; otherwise the right may be but a barren one.*"

V.

THERE IS THE UTMOST PRACTICAL NECESSITY FOR THE ISSUANCE OF THIS WRIT.

The Industrial Accident Commission of California and various other boards, commissions, officers and tribunals throughout the country continue to disregard the decisions of this Court in the *Morgan* case, where, as we have shown, compliance with the minimum requirements of that case could readily be made.

The constant denial of due process of law by the Industrial Accident Commission of California has become so notorious that a legislative investigation is now under way. The resolution authorizing this investigation was preceded by a resolution, adopted six months before, directing an investigation of all administrative procedure, to be made by the Judicial Council, an official body of the State of California. (Rec. 216-217).

The attitude of the California courts, in confirming the denial of procedural due process of law, is well illustrated in

Taylor v. Industrial Accident Commission, 38 Cal. App. 75.

There, the issue was alleged serious and wilful misconduct upon the part of the employer. It was argued that the Commissioners themselves did not consider or decide the case. Division One of the Second Appellate District held (top of p. 82) that:

> "It is at once apparent that the very object of the statute is to enable the commission to use the report of the referee in its entirety or in part as the basis for a decision or award, or, if dissatisfied with such referee's report, the commission is authorized to resort to the record in the case."

We cannot comprehend any reason why the Commission should be dissatisfied with the report, without first resorting to the record or having in hand some adequate statement of the contents of the record, far more complete than anything appearing in the matter at bar.

In further demonstration of the California courts' misapplication of the rules enunciated in the *Morgan* cases, and the resultant denial of due process of law, let us quote further from the *Taylor* case (middle of p. 82):

> "When the commission adopts the facts found and the decision recommended by the one who is authorized to and does hear the evidence, then the commission is not required to review the record. An entirely different situation would be presented if the commission, disregarding and setting aside the findings and recommendation of the referee, undertook, without a review of the evidence, to appraise the same and make determination based thereon. Such is not the case here presented."

The fallacy of the above holding is, in turn, "at once apparent." According to the opinion in the *Taylor* case, if two are wrong (the referee and the Commission) the Commission need not review the evidence, but if one is right and the other is wrong, then the Commission must review the evidence.

Thus is demonstrated the unfortunate and erroneous attitude of the courts of California toward the vital question of constitutional law here addressed to this Court.

No application for a hearing in the Supreme Court of California was made in the *Taylor* case.

If the writ is not granted in the case at bar, there may never again be an opportunity for the Court to pass upon this question, insofar, at least, as the Industrial Accident Commission of the State of California

is concerned. An authoritative work has recently appeared, written by Warren L. Hanna, a former referee of the Commission. It is there stated,

> *Hanna, Industrial Accident Commission and Procedure,* p. 221:
>
> "There is no rule requiring the Commission to disclose to the reviewing court the intimate character of the consideration which may have been given to a decision by it or its staff. Unless it chooses to do so voluntarily, the petitioner usually finds himself unable to present any evidence to overcome the presumption that official duty has been performed, particularly in respect to decisions signed by the Commission itself. This difficulty of proof is encountered because of—
>
> (1) The lack of any means of affirmatively showing that the Commission reversed the referee, instead of adopting his recommendations;
>
> (2) The lack of any positive means of showing that the Commission has not reviewed the record; and
>
> (3) The lack of any procedural opportunity to present such evidence, even if it were available, since the action of the Commission completes the record to be reviewed by the appellate court."

These practical difficulties have fortunately been overcome in the matter at bar.

We can no more fittingly conclude that in the language of Mr. Justice Cardozo in

> *Ohio Bell Telephone Company v. Public Utilities Commission* (1936), 301 U.S. 292, 304, 71 L. Ed. 1043, 1101,

that the right to a full and fair hearing before a Commission is an "inexorable safeguard" and one of the "rudiments of fair play" and that

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

We therefore urge that a writ of certiorari be granted to review this decision of the District Court of Appeal of the State of California, Second Appellate District, Division Three.

Dated, San Francisco, California,
November 10, 1944.

Respectfully submitted,
MAX THELEN,
GORDON JOHNSON,
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